IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 239 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
MANINI NIRANJAN, - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
MR MANISH J.SHAH FOR MR JP SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 21/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following question at the instance of the Commissioner of Income Tax u/s. 256(1) of the Income Tax Act,1961 (the Act).

> "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing the loss of Rs.25,000/- claimed by the assessee ?"

2 The Assessment Year is 1985-86 for which the relevant accounting period is S.Y.2040. The assessee acquired preference shares of a Private

Limited Company on 26/10/1983 for a cost price of Rs.50,000/- and sold them on 9/10/1984 for a sum of Rs.25,000/- to a trust where the trustees were members of the family of the assessee. The assessee's claim of capital loss of Rs.25,000/- came to be rejected by the Assessing Officer on the ground that the transaction had been entered into amongst family members; the funds for purchase of shares had been borrowed at the rate of interest which was higher than dividend from such shares; and the shares were sold to a family trust where the trustees were family members. The assessee failed in its appeal before Deputy CIT (Appeals), however, in the Second Appeal the Tribunal accepted the claim of the assessee.

3 Mr.M.R.Bhatt, learned Senior Standing Counsel for the applicant-revenue submitted that the reasons which weighed with the Assessing Officer

were not properly appreciated by the Tribunal while passing impugned order. According to him, considering the fact that there were number of transactions of purchase and sale of shares by and amongst the different family members, pointed to the fact that the assessee had adopted colourable device for tax avoidance. In this context he placed reliance on the decision in case of *S.P.Jaiswal Vs. Commissioner of Income Tax, (1997) 224 ITR 619 (SC)* with a special reference to observations at page 626.

4 The Tribunal has recorded that the facts do not show that there was no sale at all. Therefore, the Tribunal has not accepted the contention of revenue that the sale was bogus. The Tribunal has further found that though the transaction was amongst members of the family and/or relatives each one of them was an independent entity. That the identity or the

personality of the purchaser could not be treated as identity or personality of the assessee. It has further been found by the Tribunal that it is not a case of the revenue that the assessee is the beneficiary in the purchaser trust. Therefore, it would not be possible to hold that the vendor and the purchaser are the same although made to look different by way of device of the trust. The Tribunal has therefore, after coming to the conclusion that vendor and purchaser are separate entities, held that the loss in question is real.

5 It is apparent from the impugned order of the Tribunal that the Tribunal has recorded findings of fact after appreciating the evidence on record to come to the conclusion that the sale is genuine. Nothing has been brought on record to dislodge the aforesaid finding. The reliance of decision in the case of

S.P.Jaiswal (supra) cannot carry the case of revenue any further. It is settled law that any decision has to be read and appreciated and the ratio of the decision culled out after taking into consideration the factual matrix in which the Court was called upon to decide the issue. The controversy before the Apex Court in the said case of *S.P.Jaiswal* (supra) was in relation to applicability or otherwise of provisions of Sections 60 & 61 of the Act i.e. a case where without transfer of source of income the income is transferred for the benefit of somebody else.

6 In the result, in absence of any infirmity in light of the findings of facts recorded by the Tribunal the question is answered in the affirmative i.e. in favour of the assessee and against the revenue. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-
(D.A.Mehta,J) (H.N.Devani, J)

m.m.bhatt